

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRUCE A. QUARLES	:	CIVIL ACTION
	:	
v.	:	
	:	
JAMES A. LINEBERGER	:	NO. 01-962

**ORDER - MEMORANDUM**

AND NOW, this 20<sup>th</sup> day of March, 2002, the following rulings are entered together, inasmuch as the dispositions of the parties' motions is interrelated. Plaintiff Bruce A. Quarles' motions for "Order[s] Ordering Defendant's Agent[s] to Respond to Interrogatories"<sup>1</sup> are denied. Defendant James A. Lineberger's motion to set aside default is granted and, accordingly, plaintiff's motion for default judgment is denied as moot. Plaintiff is directed to effect service of the complaint, or else obtain a waiver of service, by April 20, 2002.<sup>2</sup>

Plaintiff's motions to compel as to "Carol Blackman" and "S. Squillau" are denied as moot, defendant having submitted certificates showing service on plaintiff of defendant's interrogatory responses. Defendant's Responses to Plaintiff's Blackman and Squillau interrogatory-motions. Defendant has not produced such a certificate, or responses as to "M.M. Dougherty" -- but the motion to compel as to Dougherty, who is not a party, must be denied for two reasons. First, interrogatories "may only be addressed to parties to the action." 8A Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, Federal Practice and Procedure § 2163 (2d ed. 1994).

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<sup>1</sup>On December 19, 2001, plaintiff filed three such motions directed at "M.M. Dougherty," "Carol Blackman," and "S. Squillau," signatories on receipts for both return of service and certified mail purporting to show delivery of copies of a summons and some version of the complaint to defendant's workplace on, respectively, May 14, 2001, September 21, 2001, and October 2, 2001.

<sup>2</sup>"If service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint, the court, upon motion or on its own initiative after notice to the plaintiff, shall dismiss the action without prejudice as to that defendant or direct that service be effected within a specified time . . . ." Fed. R. Civ. P. 4(m).

Second, as explained below, whatever responses “M.M. Dougherty” might have made to plaintiff’s interrogatories, her alleged signing of a certified mail receipt for the summons and complaint cannot effectuate service of process on defendant.

Once sufficiency of service of process is challenged, as occurred here,<sup>3</sup> “the party on whose behalf service was made bears the burden of establishing the validity of service.” Lachick v. McMonagle, et al., 1998 WL 800325, at \*1 (E.D.Pa. Nov. 16, 1998). “In the federal courts, original process may be served under either the law of the state in which the district court sits or under the Federal Rules of Civil Procedure.” Staudte v. Abrahams, 172 F.R.D. 155, 156 (E.D.Pa. 1997) (citing Fed. R. Civ. P. 4(e)(1)). Plaintiff has not met this burden either by way of personal service on “Carol Blackman”<sup>4</sup> or service by certified mail on “S. Squillau” and “M.M. Dougherty.”<sup>5</sup>

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<sup>3</sup>Defendant James A. Lineberger’s affidavit: “I was unaware that I had been served as a defendant in this matter until I spoke to my attorney on December 5, 2001.” Defendant’s Motion to Set Aside Entry of Default, Exhibit A at 2.

<sup>4</sup>Service at the workplace must either be through delivery of “a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process,” Fed. R. Civ. P. 4(e)(2), or under Pennsylvania law through handing to “an individual with some direct connection to the party to be served or one whom the process server determines to be authorized, on the basis of her representation of authority, as evidenced by the affidavit of service.” Grand Entertainment Group v. Star Media Sales, 988 F.2d 476, 486 (3d Cir. 1993) (interpreting Pennsylvania R. Civ. P. 402(a)(2)(iii) and holding that a building receptionist “with no employment ties to the defendant” was not authorized to receive service for him). Defendant avers that he does “not personally know a ‘Carol Blackman’, but believe[s] that she . . . works in the reception area of the Criminal Justice Center.” Defendant’s Motion to Set Aside Entry of Default, Exhibit A at 2. Plaintiff has produced no evidence that contradicts this or otherwise meets the burden of showing proper service.

<sup>5</sup>Except where a waiver has been obtained, neither the Federal or Pennsylvania Rules of Civil Procedure “provide for service of original process by mail, including certified mail.” Staudte, 172 F.R.D. at 156 (citing authorities); Apgar v. State Employees’ Retirement System, 655 A.2d 180, 184 (Pa.Cmwlth. 1994) (holding that “procedural rules governing service of process must be strictly followed” and those rules “do not allow for service of process by certified mail” except in “limited situations” [not applicable here]) (quoting Sharp v. Valley Forge Medical Center, 422 Pa. 124, 127, 221 A.2d 185, 187 (1966)). Even where a defendant “clearly [has] actual notice of plaintiff’s . . . complaint, actual notice by itself is not enough to establish personal jurisdiction over a person in the absence of valid service of process.” Thompson v. Mattleman, et al., 1995 WL 321898, at \*5 (E.D.Pa. May 26, 1995) (finding an attempted workplace service of process invalid). Accordingly, both attempts at service by certified mail in this case are invalid even if “M.M. Dougherty’s” possible responses to plaintiff’s interrogatories might have tended to show actual notice.

(continued...)

Accordingly, defendant's motion to set aside default must be granted.<sup>6</sup> Plaintiff will not be significantly prejudiced if the default is set aside,<sup>7</sup> defendant has satisfactorily alleged a meritorious defense,<sup>8</sup> and, given the improper service of process, the default appears not to have resulted from defendant's culpable conduct.

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Edmund V. Ludwig, J.

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(...continued)

While our Court of Appeals has held that "[w]hen there is actual notice, every technical violation of the rule or failure of strict compliance may not invalidate the service of process," it also cautions that "the rules are there to be followed, and plain requirements for the means of effecting service of process may not be ignored." Stranahan Gear Co., Inc. v. NL Industries, Inc., 800 F.2d 53, 56 (3d Cir. 1986) (quoting Armco, Inc. v. Penrod-Stauffer Building Systems, Inc., 733 F.2d 1087, 1089 (4<sup>th</sup> Cir. 1984)). Moreover, "[t]he advisory committee notes on the 1993 Amendments to Rule 4(d) make clear that service cannot be 'effected by mail without the affirmative cooperation of the defendant . . .'" Davis v. Grimaldi, et al., 1998 WL 967516, at \*4 (E.D.Pa. Sept. 29, 1998) (quoting Fed. R. Civ. P. 4(d) Advisory Committee's note). Plaintiff has not presented, nor is his interrogatory to "M.M. Dougherty" calculated to reveal, evidence of such "affirmative cooperation."

<sup>6</sup>Three factors are to be considered in deciding whether to set aside a default under Fed. R. Civ. P. 55(c): "(1) whether the plaintiff will be prejudiced; (2) whether the defendant has a meritorious defense; (3) whether the default was the result of the defendant's culpable conduct." United States v. \$55,518.05 in U.S. Currency, 728 F.2d 192, 194 (3d Cir. 1984). \$55,518.05 in U.S. Currency covers both motions to set aside default and motions for default judgment, and its three factors have been reiterated recently as to default judgment motions. Chamberlain v. Giampapa, 210 F.3d 154, 164 (3d Cir. 2000).

<sup>7</sup>Delay alone is seldom enough to establish requisite prejudice. "Delay in realizing satisfaction on a claim rarely serves to establish the degree of prejudice sufficient to prevent the opening [of] a default judgment entered at an earlier stage of the proceeding." EMCASO Insurance Comp. v. Sambrick, 834 F.2d 71, 74 (3d Cir. 1987) (citing Feliciano v. Reliant Tooling Co., Ltd., 691 F.2d 653 (3d Cir. 1982)) (no prejudice where motion to set aside default judgment was filed two weeks after entry of default judgment and loss of evidence or hindered ability to pursue the claim was not alleged). Here, defendant's motion to set aside default was filed just over one month after default was entered and a little over two weeks after plaintiff's motion for default judgment was entered.

<sup>8</sup>Defendant has alleged that at "all relevant times hereto, [he] acted within the scope of [his] official duties as a Judge of the Court of Common Pleas of Philadelphia County," and so "he is absolutely immune from Plaintiff's claims under the doctrine of judicial immunity." Defendant's Motion to Set Aside Entry of Default, Exhibit A at 2; Defendant's Response to Defendant's Objections to Motion to Set Aside Entry of Default at 2.